

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 05-cv-329-GKF(SAJ)
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO
"DEFENDANTS' MOTION TO REQUIRE CONSOLIDATION OF
PLAINTIFFS' [sic] EXCESSIVE RESPONSES OR IN THE
ALTERNATIVE FOR ADDITIONAL TIME TO REPLY" [DKT #1812 & #1814]**

Plaintiff, the State of Oklahoma ("the State"), respectfully requests that "Defendants' Motion to Require Consolidation of Plaintiffs' [sic] Excessive Responses or in the Alternative for Additional Time to Reply" [DKT #1812 & #1814] ("Motions") be denied for the reasons that follow.

I. Factual background

The relevant facts are as follows:

1. On October 31, 2008, Defendants filed, as a single docket entry, two disparate motions. *See* DKT #1788 ("Defendants' Motion to Dismiss for Failure to Join the Cherokee Nation as a Required Party or, in the Alternative, Motion for Judgment as a Matter of Law Based on a Lack of Standing").
2. On November 3, 2008, apparently recognizing that it encompassed two separate motions, the Court divided the filing into two separate motions, assigning each a separate docket number. *See* DKT #1788 ("Defendants' Motion to Dismiss for Failure to Join the Cherokee

Nation as a Required Party") & DKT # 1790 ("Defendants' Motion for Judgment as a Matter of Law Based on a Lack of Standing").

3. Consistent with the Court's action dividing the single filing into two motions with two separate docket numbers, the State responded separately to these two separate motions on December 15, 2008¹. *See* DKT #1810 ("State of Oklahoma's Response in Opposition to 'Defendants' Motion to Dismiss for Failure to Join the Cherokee Nation as a Required Party'") & DKT #1811 ("State of Oklahoma's Response in Opposition to 'Defendants' Motion for Judgment as a Matter of Law Based on a Lack of Standing'").

4. Both of the State's responses to these two separate motions fully complied with the dictates of LCvR 7.2(c). *See* DKT #1810 (21 pages) & DKT #1811 (24 pages).

II. Argument

Defendants' entire argument for consolidation is premised on a single faulty assertion -- that the State filed two separate responses to "Defendants' Rule 19 Motion." *See* Motions, p. 1. The State did not. Rather, it filed one response to "Defendants' Rule 19 Motion to Dismiss for Failure to Join the Cherokee Nation as a Required Party" and one response to "Defendants' Motion for Judgment as a Matter of Law Based on Lack of Standing." The fact that Defendants filed two separate motions is readily apparent from the title of their initial filing which references two different motions and the fact that the Court had to divide the filing into two separate motions and two separate docket entries.

Defendants are improperly asking the Court to require the State to file a single, consolidated response to these two factually and legally distinct motions. The State is entitled to file a response to each motion and the State's rights should not be diminished simply because

¹ The Court on November 17, 2008, granted the State an extension of the 18-day response deadline. *See* DKT #1800.

Defendants' failed to properly file these disparate motions separately. The undeniable fact of the matter is that Defendants attempted to file two disparate motions as a single docket event, and the Court split the two disparate motions apart, assigning them distinct docket numbers. The State's action of filing separate responses to these two separate motions, each fully compliant with the dictates of LCvR 7.2(c), was therefore entirely proper. Simply put, the State should in no way be penalized for Defendants' failure to follow appropriate motion practice.

Defendants attempt to argue that the State's separate responses to the two motions are inconsistent with the State's prior practice of filing consolidated responses to the numerous two-part motions filed by Defendants that the Court has had to divide into separate docket events. While the State would have been well within its rights to file separate responses to those distinct motions, the State simply chose not to because they contained closely-related subject matters -- a fact conveniently overlooked by Defendants.² Unlike those situations, however, here Defendants filed two motions founded on very different grounds. One was a Rule 19 motion. The other was a "motion for judgment as a matter of law" that had no mooring in the Federal Rules, but which appeared to be a third attempt for dismissal of certain of the State's claims on

² Moreover, despite the fact that these two-part motions were closely related, it should be noted that Defendant Peterson has used the fact that the Court split one of its two-part motions into two entries to file *two separate reply briefs*. Specifically, in the motion to dismiss stage of this case, Defendant Peterson filed two separate motions as a single docket event. See DKT #75 ("Peterson Farms, Inc.'s Motion to Dismiss and, or in the Alternative, Motion to Stay Proceedings Pending Appropriate Regulatory Agency Action, and Brief in Support"). The Court split these two motions apart, assigning them distinct docket numbers. See 10/6/05 Notation on Docket, DKT #75 ("Motion to Dismiss and Brief in Support by Peterson Farms, Inc.") & DKT #90 ("Motion to Stay Proceedings Pending Appropriate Regulatory Agency Action"). The State filed a consolidated response to these two motions. See DKT #134. And then Defendant Peterson proceeded to file *two separate reply briefs* to the State's consolidated response. See DKT #147 ("Reply to Plaintiffs' [sic] Response in Opposition to Peterson Farms, Inc.'s Alternative Motion to Stay Proceedings Pending Appropriate Regulatory Agency Action, and Brief in Support") & DKT #149 ("Reply to Plaintiffs' [sic] Response in Opposition to Peterson Farms, Inc.'s Motion to Dismiss, and Brief in Support").

the basis of standing. (This Court has previously denied Defendants' previous two efforts at attacking the State's standing. *See* DKT #1187, #1435 & #1439). The legal issues and arguments presented by Defendants' Rule 19 Motion (whether the Cherokee Nation is a necessary party) are entirely different from the legal issues and arguments presented by Defendants' Motion for Judgment as a Matter of Law (whether the State has standing to assert its damages claims). Given that Defendants filed two motions requesting different relief on different grounds, separate responses were entirely appropriate. Contrary to Defendants' arguments, the State was permitted to file a response to each of Defendants' motions without requesting leave of the Court. The State's two responses were each well within the 25-page page limit provided for in LCvR 7.3(c). In sum, contrary to Defendants' suggestion, the State did not "g[i]ve themselves [sic] a 45 page response to Defendants' 25-page motion." Rather the State exercised its rights under LCvR 7.3(c), and the Court now has a full and accurate record on which to decide -- and deny -- Defendants' two motions.

Under the Local Rules, to the extent that they desire to file replies to the State's respective responses, Defendants will have 10 pages for each reply. *See* LCvR 7.3(h). Moreover, under the Court's extension order, *see* DKT #1800, Defendants will have 21 days to reply rather than the 14 days they would have otherwise had under LCvR 7.3(h). Under the circumstances, Defendants should not be granted an additional two weeks to reply -- particularly when they minimized the complexity of the issues when the State sought an extension of time to file its responses. *See* DKT #1797.³

³ The other two reasons Defendants raise in support of their request for additional time do not stand up to scrutiny. With respect to the appeal before the Tenth Circuit, Defendants' response brief is not due until January 23, 2009. With respect to Defendants' expert disclosures, Defendants have already received lengthy extensions to their disclosure deadline. Dozens of

III. Conclusion

WHEREFORE, premises considered, Defendants' Motions [DKT #1812 & #1814] should be denied.

Respectfully Submitted,

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counsel have entered appearances for Defendants. Claims that they do not have sufficient resources to prepare their reply briefs in the three weeks already allotted are not credible.

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